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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 480

BERNARD MITCHELL WOLFE and FREDERICK J. DANNENFELSER, Individuals and Co-Partners Doing Business Under the Name and Styles "Dutch Paint Co." and "Manning-Mitchell Paint Co.,"
Petitioners,

vs.

NATIONAL LEAD COMPANY, a New Jersey Corporation; E. I. du PONT de NEMOURS AND COMPANY, INC., et al.,
Respondents.

BRIEF IN OPPOSITION OF RESPONDENT E. I. du PONT de NEMOURS AND COMPANY.

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OPINIONS BELOW.

The opinion of the court of appeals (225 F.2d 427) is printed as Appendix B to the petition. The opinion of the district court (R. 1315-1319) is unreported.

PRELIMINARY STATEMENT.

Petitioners brought this suit under the Sherman Act to recover for claimed injuries arising out of an alleged conspiracy between respondents to fix the price of titanium pigment, an ingredient of paint, and to limit the amount of such pigment sold to petitioners. At the close of plaintiffs' case the district court dismissed the complaint on the ground that petitioners had failed to prove any injury. The court added, however, that if it had been necessary to decide the issue of conspiracy its holding would have been that the evidence on that issue also was insufficient:

> "It is not necessary in my opinion in this particular case to reach the question whether there is sufficient evidence to sustain the charge that the defendants committed the alleged forbidden acts, although I am of the opinion that if it were reached, the holding would have to be that the evidence in that regard, by applicable legal standards, is insufficient" (R. 1317).

The court of appeals found it unnecessary to pass on the issue of conspiracy. It affirmed the judgment, concurring in the finding that "there is no proof that appellants sustained any injury as a result of appellees' conduct or alleged conduct" (Appx. B to Petition, pp. xv, xviii).

This decision, we submit, is clearly correct. In reaching it the court applied settled principles of law. Contrary to the assertions of the petition, the ruling is not in conflict with any other decision and involves no novel question or question of general importance.

STATEMENT OF THE CASE.

Respondents are manufacturers of titanium pigment. During and following World War II there was an extreme shortage of this pigment (R. 551, 588, 897). After the war the Government instituted certain programs designed to help returning veterans get started in business. In these programs the Civilian Production Administration, successor to the War Production Board, had authority to allocate scarce materials to veterans (R. 1766). At an Industry Advisory Meeting in Washington on February 13, 1946, the Civilian Production Administration instituted a veterans' quota program (R. 211, 1767-1773). Petitioners were the beneficiaries of this program. Under it, unlike any other class of paint manufacturers in the country, they received an assured *minimum* quota of titanium pigment. In addition each respondent, from time to time and in differing amounts, sold them quantities of titanium pigment in excess of their quotas, and continued to do so after the Government discontinued its quota program in January, 1947 (R. 212-213, 1047, 1442, 1779).

Petitioners started in the paint manufacturing business in 1946 (R. 204-205, 953-954). Except for a Navy acquired background in paint manufacturing, they had had practically no previous business experience (R. 1075, 1138). Their total investment was $2,000 each.[1] Four years later their business had a net worth of $132,000. In addition it had yielded net income of more than $392,000, of which $262,000 had been paid in salaries, bonuses and partners'

[1]Three associates, whose interests petitioners later acquired (R. 203-204, 1070-1071), contributed like sums—a total capital investment in the new business of $10,000.

drawings, and $23,000 in dividends (R. 1070-1074, 1418, 1421, 1424).

During the years 1947 and 1948 the titanium pigment shortage continued. Like other paint manufacturers, petitioners manufactured paint with such titanium pigment as they were able to obtain, reprocessed paints, and also manufactured paints from lithopone, a substitute pigment (R. 980-984, 1147). By 1949 production finally caught up with demand and titanium pigment became in free supply (R. 611-612, 874-875, 891-983). Petitioners do not contend that they were the victims of any restraint of supply in 1949 (R. 214-215, 1132). However, the record shows that during the years 1947, 1948 and 1949 petitioners' net income was as follows (Appx. B to Petition, p. vii):

1947	1948	1949
$102,671.60	$154,393.78	$81,784.46

Faced with the anomaly that their greatest earnings were realized in the years of alleged restraint, petitioners sought to lay some basis for a claim of injury by comparing, for the years 1947, 1948 and 1949, what they termed "gross profit on materials handled." This was, for each year, an artificial figure, arrived at simply by deducting the cost of raw materials from total gross sales (R. 1661, 1163-1164, 1194). Both courts below held that such figures had "no probative value" (Appx. B to Petition, p. ix). As the court of appeals said, "All cost except cost of merchandise sold, is eliminated, including labor, depreciation, maintenance, repairs, and all the other expenses of doing business" (Appx. B to Petition, p. ix). Moreover, the court pointed out, the attempted compari-

son ignored the fact that during the years of shortage petitioners used their plant to manufacture paints from substitute pigments as well as from titanium:

> "• • • appellants admitted that they were able to get all of the ingredients to manufacture paint that they needed except titanium pigments. In fact they purchased immense quantities of one of such substitutes, lithopone, in 1948, buying 403,050 pounds of it in that year. They could not have been injured by their failure to secure all the titanium pigment they wanted, if they were able to obtain all they could use of a substitute in the form of lithopone. • • • there is no proof that they failed to sell any part of their paint production at a profit. Their great financial success during the years of shortages when they were using the large quantities of lithopone in their paints indicates the contrary. • • • in the period of shortage, the public wanted the paint at appellants' price, whether it was made with titanium or lithopone" (Appx. B to Petition, pp. xiv-xv).

Petitioners further contended that the issue of injury should have gone to the jury upon mere proof of the quantities and price of the lithopone used, as compared with the cost of an equivalent amount of titanium, a cheaper pigment. The court below pointed out that petitioners had produced no evidence to show that they had absorbed any of this increased cost.[2]

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[2]In their petition in this Court petitioners compute these "damages" in the amount of something over $18,000, a figure arrived at by taking *all* of the lithopone they used during the shortage years as a multiplier (Petition, p. 12). Quite apart from the fact that they failed to prove that they absorbed any of these costs, this figure, of course, is based upon the assumption—wholly unsupported by any evidence—that they alone, of all paint manufacturers in the country, would have received a 100 per cent supply of titaniur during these years.

Finally, petitioners contended that they were damaged by paying higher prices for titanium pigment as the result of the alleged price-fixing conspiracy. The court of appeals pointed out that here again there was no proof that petitioners had absorbed any such costs; further, that there was no evidence "that prices were fixed at a higher level than would have been the competitive price, in the absence of price fixing * * *" (Appx. B to Petition, pp. xv-xvi).

In sum, the court of appeals agreed with the expression of the district judge, made after he had viewed all of petitioners' contentions against the background of the facts of record:

> "Against this background there is no case cited, nor which any independent research has disclosed, which supports such a twisted rationale of damage standards. * * *
>
> At the times in question here, and against the factual setting shown by the evidence presented by the plaintiffs, there is no question of fact, in my opinion, to go to the jury. The evidence shows the plaintiffs to have been newcomers to an industry. As such, during the years in question, they received their share of a short material and conducted a profitable business from the beginning. Thus they received the benefit in a competitive industry that they might never have received had they entered the industry in a period of full supply and competition.
>
> * * * * * * *
>
> To submit this case to the jury, gentlemen, would be, in my opinion, to give judicial blessing to a decision based on speculation, surmise, conjecture and perhaps worst of all, upon a possible desire to punish for an unproved public wrong" (R. 1318, 1319).

ARGUMENT.

Petitioners contend that the decision of the court of appeals conflicts with *Bigelow v. RKO Radio Pictures* (1946) 327 U.S. 251, *Eastman Co. v. Southern Photo Co.* (1927) 273 U.S. 359, *Chattanooga Foundry v. Atlanta* (1906) 203 U.S. 390, and *Thomsen v. Union Castle Mail S.S. Co.* (2 Cir. 1908) 166 Fed. 251.

There is no conflict. On the contrary, the ruling below is in accord with the decision in each of the cases cited.

In *Bigelow* the petitioners proved that they had suffered injury—actual diminution of income during the years they were denied the same clearance position as comparable theatres. Uncertainty existed only as to the amount of damages. In the case at bar—quite apart from the fact that the trial court was of the opinion that no restraint had been proved—there was no proof of injury during the years of the alleged restraint. *Bigelow* would more resemble this case had it there appeared that, during the period of the alleged conspiracy to limit clearances on certain films, an extreme shortage of such films occurred and the owners of the Jackson Park Theatre were able, with other films readily available, to play to audiences as large as they wished to accommodate and made more money than they ever had earned during previous years.

Nor is the decision in conflict with *Eastman Co. v. Southern Photo Co.* In that case plaintiff was a dealer in photographic materials and supplies. The proof established that the supplies cut off by defendant were sold by plaintiff as a separate and distinct line and that "its business was so organized that it would have been able

to continue to handle the defendant's goods during the period in suit with no increase in its general expenses and no additional cost except that incident to the handling of such goods themselves * * *" (273 U.S., 376). No substitute for Eastman supplies was available. In the case at bar petitioners were able to obtain all of the substitute pigment they desired. Their facilities were used interchangeably for the manufacture of paint with titanium pigment or substitute pigment. They were able to sell all paint, both titanium and lithopone, at a handsome profit.

In *Chattanooga Foundry v. Atlanta* this Court held that the judgment should be sustained where "The verdict was for the difference between the price paid and the market or fair price that the city would have had to pay under natural conditions had the combination been out of the way" (203 U.S., 396). And in *Thomsen v. Union Castle Mail S.S. Co.*, the court held that a complaint stated a cause of action where it sought to recover the difference between a "reasonable rate" and an excessive rate fixed by a combination in restraint of trade. In contrast, as the court below pointed out (Appx. B to Petition, pp. xv-xvi), in this case "there is no evidence that prices were fixed at a higher level than would have been the competitive price, in the absence of price fixing."

Finally, petitioners criticize the court below for applying the so-called "passing on" rule. But it is axiomatic that a private treble damage action under the antitrust laws requires proof of injury to the business or property of the plaintiff. Patently, no such injury can occur where increased costs are passed on to others. This was one of

the points decided by this Court in *Keogh v. C. & N. W. Ry. Co.* (1922) 260 U.S. 156, 164-165, and has been applied in an unbroken line of decisions by other courts.[3]

CONCLUSION.

The decision of the court of appeals is clearly correct. It turns upon an appraisal of the facts of this record, concurred in by both courts below. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
November 15, 1955.

Respectfully submitted,
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[3]See,
Twin Ports Oil Co. v. Pure Oil Co. (8 Cir. 1941) 119 F.2d 747; cert. denied 314 U.S. 644 (1951);
Northwestern Oil Co. v. Socony-Vacuum Oil Co. (7 Cir. 1943) 138 F.2d 967; cert. denied 321 U.S. 792 (1944);
Clark Oil Co. v. Phillips Petroleum Co. (D.Minn. 1944) 56 F.Supp. 569, 572, 574; aff'd 148 F.2d 580 (8 Cir. 1945), cert. denied 326 U.S. 734 (1945).